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NO. 377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

DR. GEORGE J. BETO,
DIRECTOR OF TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

EUGENE WELCH,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. George J. Beto, Director of the Texas Department of Corrections, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 3, 1966, with Petition for Rehearing being finally overruled by such Court on April 26, 1966.

OPINION BELOW

The opinion delivered in the Court below is reported in 355 F. 2d 1016, and is appended to this Petition as Appendix "A." A Petition for Rehearing was filed and the Court below ordered the parties to brief the questions raised therein (Appendix "B"). However, on March 28, 1965, and prior to the filing of a "Reply Brief" by Petitioner as was directed by the Court's order, the Court below overruled the Petition for Rehearing (Appendix "C"). Subsequently, Petitioner's

Motion to Reconsider the decision in connection with the Petition for Rehearing was granted, and the Court directed the Clerk to file Petitioner's Reply Brief; then, upon reconsideration, the Court below denied the Petition for Rehearing on April 26, 1966 (Appendix "D").

JURISDICTION

As indicated above, the judgment of the Circuit Court of Appeals below was entered on February 3, 1966. Rehearing was finally denied on April 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Do state court defendants have a constitutional right known as "procedural due process" that arises where a state has a criminal procedure, not required by the United States Constitution, and the State does not follow this procedure in a criminal case?

2. Should the federal courts substitute their interpretation of a state criminal procedure for that of the state courts in determining whether the state has correctly followed the questioned procedure?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The constitutional question presented in this Court was generated by the re-interpretation by the Court of Appeals below by Article 932b, Section 4 of the Texas Code of Criminal Procedure, 1925, which provides:

> "Insanity as Bar to Execution of Death Sentence
>
> "Sec. 4. *If the question of the sanity* of a per-

son under death sentence *is raised and sufficient proof is shown to satisfy the judge of the convicting court* or the judge of the district court of the county in which the person is confined *that reasonable doubt exists as to his sanity, the judge shall impanel a jury to determine whether the person is sane or insane.* If the jury finds the person is insane, the court shall enter an order committing him to a State mental hospital to be confined therein as a person charged with a criminal offense until he becomes sane. If the jury finds the person is sane, the court shall remand him to the proper authority for disposition according to law." (Emphasis supplied.)

The due process clause of Amendment Fourteen, Section 1, United States Constitution, is likewise involved since the Court below determined that the State of Texas had denied to the Respondent herein due process by it failure to grant to Respondent the rights set out in the Texas statute cited above as that statute was construed by the Court below. The pertinent parts of Amendment Fourteen are, "nor shall any state deprive any person of life, liberty or property, without due process of law," and presumably the Court below found that this enjoiner had not been observed by the State of Texas because the Texas Courts had incorrectly interpreted the above quoted state statute and thus denied to the Respondent "procedural due process."

STATEMENT OF THE CASE

Eugene Welch, the Respondent, was tried and convicted in the District Court of Grayson County, Texas, for the murder of Robert Wayne Ballou, a minor, while robbing the Ballou family, at their home. Welch was sentenced to death.

The evidence adduced at the trial showed that Welch entered the farmhouse where the deceased lived with his mother, father, and brother at about 10:15 P.M., June 10, 1962. At pistol point, he tied up the members of the family and secured money from the billfolds of the men. Welch also obtained money secreted in the brassiere of the mother after taking her outside the house for an extended period of time. He then threatened to kill all the members of the family to prevent them from identifying him subsequently, and threatened to set fire to the house. He picked up a .22 rifle that was in the house and loaded it, putting the pistol in his pocket. Welch then shot one of the sons, Robert Wayne Ballou, in the eye causing the death of the boy.

Upon seeing his son shot, the father broke his bonds and attempted to grapple with Welch. Welch struck the father several times on the head with the rifle bending the barrel and inflicting a serious wound. The mother and the other son who were still tied, attempted to assist the father and Mrs. Ballou was also struck with the rifle. However, in the struggle, Respondent lost possession of the rifle and his pistol and fled from the house. He was later apprehended and brought to trial.

At the trial, Welch's only defense was insanity. The sole evidence on this issue was the testimony of Dr. David T. Wells, a psychiatrist, who testified that Welch had the mental capacity of a 12 year old, that he was insane and that he did not know the difference between right and wrong at the time of the commission of the crime or at the time of the trial. The State rebutted this evidence by the testimony of laymen who had had contact with Welch and by the County Physician, all of whom testified that Welch was sane and could dis-

tinguish the difference between right and wrong. The jury resolved the issue of insanity against Welch and as noted above found him guilty and assessed his sentence as death.

The Texas Court of Criminal Appeals affirmed the conviction.

After affirmance and before sentence was imposed (under the Texas Code of Criminal Procedure, 1925, the sentence in capital cases is deferred until after the appeal, if any), Welch filed a motion for a post-conviction sanity hearing under Section 3 of Article 932b, Texas Code of Criminal Procedure, 1925. This motion was denied, sentence was imposed and subsequent thereto, Welch filed a motion under Section 4 of Article 932b, the statute being set out above in this petition, asking that the Court grant a post-sentence sanity hearing. This motion was also overruled.

With both motions for a sanity hearing, the affidavit of Dr. Wells, the psychiatrist who had testified at the trial was submitted. The affidavit was similar to the trial testimony and stated that in the psychiatrist's opinion Welch was mentally ill, could not understand the consequences of the act he committed or the proceedings against him and could not differentiate between right and wrong. In denying each motion, the Court heard no evidence as to sanity presented on behalf of the State.

The refusal of the state trial judge to order a sanity hearing pursuant to the motions filed by Welch was upheld by the Texas Court of Criminal Appeals when the issue was presented to that body on writ of habeas corpus. This Court is the highest Court in Texas that is concerned with criminal cases.

Welch next filed an application for a writ of habeas corpus in the Federal District Court for the Southern District of Texas. After a rather lengthy evidentiary hearing, the writ was denied and Welch appealed to the Court of Appeals for the Fifth Circuit. That Court reversed the decision of the lower court and ordered that Welch should not be executed until such time as the State had the opportunity to accord him a post-conviction sanity hearing under Section 4, Article 932b, Texas Code of Criminal Procedure, 1925.

In reaching this decision the Court of Appeals observed and held:

> ". . . the Texas law creates in petitioner a substantive right not to be executed while insane, even if such right is not contained in the due process clause of the Fourteenth Amendment. *Appellant 'is entitled to have procedural due process observed in the protection of these substantive rights even though substantive due process would not compel the rights to be given.'* United States ex rel Smith v. Baldi, 192 F. 2d 540, 544 (3 Cir. 1951), aff'd. 344 U.S. 561 (1953). Texas law looks to a jury to try this question of sanity where there is reasonable doubt as to such sanity. It is left to the judge of the convicting court to determine whether such reasonable doubt exists, and, although the trial judge is vested with considerable discretion in the matter, he is not given arbitrary power. If he acts in a fashion unsupported by the evidence, he has ceased to act judicially, and has denied the prisoner before him procedural due process." (Emphasis supplied.)

The State of Texas contended that the trial court had acted properly in denying the motion for a sanity hearing since Section 4 of Article 932b (quoted in full above) requires that the moving party must not only

raise the question of sanity but must submit to the trial judge "sufficient proof . . . to satisfy the judge . . . that reasonable doubt exists as to his sanity." Here the only proof shown was an affidavit from the same psychiatrist who had testified at the trial on the merits and whose testimony had been rejected in toto by the jury. The trial judge concluded, and his decision was upheld by the Texas Court of Criminal Appeals, that the showing was insufficient to satisfy him (the trial court) that a reasonable doubt existed as to Welch's sanity at the time.

The Court of Appeals, however, concluded that Welch's burden was:

> ". . . to present facts sufficient to create in the Court's mind reasonable ground to doubt his sanity. This burden was met handily by the affidavit of Dr. Wells. . . ."

The Court termed the proof offered by Welch a "prima facie showing" and held that the State was then required to offer evidence sufficient to enable the trial judge to conclude that sufficient proof did not exist to require the calling of a hearing, and failing in the production of such evidence, the Court was required to empanel a jury to determine Welch's sanity (Page 7 of the Opinion below). The Court of Appeals thus substituted its decision as to the proper interpretation of Section 4 of Article 932b for that of the Texas District Court and Court of Criminal Appeals by substituting its judgment as to the quantum of proof necessary to invoke the post-conviction hearing provisions of that statute.

REASONS FOR GRANTING THE WRIT

1. *The impact of the decision in the Court below in*

the area of habeas corpus proceedings involving a petition by a state prisoner is limitless. The Court of Appeals, in determining that Texas had not followed one of its criminal procedure statutes properly and holding that such erroneous interpretation by the state courts constitutes a denial of "procedural due process," will require the Federal Courts (District, Courts of Appeals and Supreme Court) to pass on and interpret any and all state criminal statutes, as well as procedures adopted by state court decisions, in all habeas corpus cases filed by state prisoners.

The Federal Courts, under the decision below, will become super-appellate courts to review all alleged errors committed in the courts of the fifty states even though no Federal constitutional question is presented as that term is presently understood and defined. Any error in the application of any state criminal law will constitute a denial of "procedural due process."

Moreover, under the holding of the Court below, the Federal Courts will reject a state's interpretation of its criminal statutes if the Federal Courts think the interpretation or application is wrong, substitute a Federal interpretation of the state statute or procedure, find that the state committed error in applying its own procedures or statutes, conclude that there has been a denial of "procedural due process" by the state and order reversal of the conviction.

The implications of the decision below are boundless and infinite. The universal application of the doctrine espounded by the decision, which is called into question before this Court, would mean a re-examination of all habeas corpus cases involving state prisoners that have heretofore been decided adversely to the prisoner on

the basis that there was no Federal question presented but only an alleged error in the application of state law. A reversal of these re-considered cases by a determination that there was a denial of "procedural due process" in the state proceeding "would seriously obstruct the administration of our criminal law" and "would require the retrial or release of numerous prisoners found guilty . . . in conformity with previously announced constitutional standards." See *Johnson v. New Jersey,* —— U.S. ——, decided by this Court on June 20, 1966.

Futhermore, the decision will require a review of *all* future state criminal convictions since the Federal Courts will be required to review all alleged state errors and determine whether or not there was a denial of "procedural due process."

2. *The "procedural due process" foundation of the decision of the Court of Appeals below, requiring the review of all errors in state criminal cases whether or not the error goes to a denial of a right protected by the United States Constitution, is erroneous and in conflict with decisions of other Circuit Courts of Appeal and with decisions of this Court.*

This Court observed in *Buckholder v. New York,* 319 U.S. 427 (1943):

> "The due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law."

A further statement of this principle by the Sixth Circuit is found in *Wooten v. Bomar,* 267 F. 2d 900 (1959), at page 901, where it is stated:

> "There seems to be a great mis-apprehension among prisoners in State penal institutions that a

> writ of habeas corpus in Federal Courts gives them an opportunity to have a general review of their original trials. This writ, powerful and important as it is, has its limitations. It is available to correct the denial of fundamental constitutional rights, but it may not be used to correct mere irregularities or error of law. . . ."

To the same effect is the Ninth Circuit case of *Rhay v. Browder,* 342 F. 2d 345 (1965), wherein the Court said at page 349 of the opinion:

> ". . . This court does not yet sit, and we hope it will never have to sit, as an appellate court to review all of the errors that may be claimed to have been committed in the course of state criminal trials. We have repeatedly held that a defendant is not entitled to an error-free trial, and that the writ of habeas corpus is not a substitute for an appeal."

The decision below runs directly counter to the principles announced by the foregoing cases in holding that errors in applying state law amount to denial of "procedural due process" and should accordingly be "reviewed" and "corrected" by a federal court in habeas corpus proceedings.

3. It has been observed that the Court below decided there had been a denial of "procedural due process" because the Court interpreted Section 4 of Article 932b differently than the interpretation placed on the statute by the state courts of Texas. This conclusion is obvious since the Court below substituted its wisdom and judgment concerning the quantum of proof that is required to be presented to a state trial judge in order to require the empaneling of a jury to decide the issue of post-conviction insanity.

This substitution by the Court below of its interpretation of a state statute for the interpretation placed on the statute by the state courts is erroneous and in conflict with decisions of other Circuit Courts of Appeals and with decisions of this Court.

This Court noted in *Shuttlesworth v. Birmingham,* 382 U. S. 87 (1965).

> "It is our duty, of course, to accept this state judicial construction of the ordinance. Winters v. New York, 333 U.S. 507, 92 L ed 840, 68 S Ct 503; Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 US 495, 92 L ed 99, 68 S Ct 167."

See also *Williams v. Oklahoma,* 358 U.S. 576, 582, 583 (1959); *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 178 (1940).

(Parenthetically, it should be observed that *Shuttlesworth v. Birmingham,* cited immediately above, should not be considered as authority to buttress the decision of the Court below. The *Shuttlesworth* case, as do other authorities, including *Thompson v. City of Louisville, et al.,* 362 U.S. 199 (1960), a case cited by the Court below in support of its ruling, stand for the proposition that it is a violation of Federal due process to convict and punish a defendant without evidence of guilt. The holding is not pertinent to a determination of the necessary quantum of proof which must "satisfy" the trial judge that a reasonable doubt exists as to the sanity of a defendant after conviction. In *Shuttlesworth,* for example, the conviction was violative of the Sixth Amendment right to a fair trial, or, possibly the finding of guilty without evidence of guilt is offensive to fundamental fairness and the basic standards of justice and so a denial of due process.

These cases, *Shuttlesworth* and *Thompson v. City of Louisville,* are not authority for a general proposition that any findings, unrelated to guilt or innocence, and unsupported by evidence, are violative of due process. *Shuttlesworth* is also consistent and in conformity with the principles which Petitioner enunciates below and urges as a basis for measuring and deciding all Federal habeas corpus cases.)

The decision below, which interpreted a state statute in contradiction to the meaning placed on the statute by the state courts, is also in conflict with decisions of other circuits. The Tenth Circuit in *Mesner v. Oklahoma,* 298 F. 2d 718 (1961), and the Eighth Circuit in *Olson v. Minnesota,* 344 F. 2d 139 (1965), have held that a Federal Court should not substitute its interpretation of a state statute for that of the highest state court.

It should also be noticed that the issue here concerns the quantum and weight of evidence that must be proffered by a defendant to be entitled to have a jury consider alleged insanity after conviction. Questions pertaining to the burden of proof and the sufficiency of evidence are ordinarily matters to be resolved solely by the state courts. *Rhay v. Browder,* supra; *Faust v. North Carolina,* 307 F. 2d 869 (4th Cir. 1962), cert. den. 371 U.S. 964.

4. A doctrine defining "procedural due process" in state proceedings as a federal constitutional right, will, as noted under Paragraph 1 of this section of the Petition, turn the federal judiciary into a super-appellate court requiring the review of all state errors—thereby interfering with traditional state-federal judiciary functions, impeding the finality of state court

decisions, and increasing the burden on the federal judiciary.

Accordingly, this Court should clearly repudiate the principle of "procedural due process" and hold, as applied to state prisoners seeking federal habeas corpus or certiorari relief that *there is no constitutional right or principle cognizable or known as "procedural due process."*

While a judicial rule, denominated "procedural due process," may have a place in the federal courts in deciding and determining cases originating and tried in the federal courts, there is no place for "procedural due process" when the federal courts review state criminal procedures either by habeas corpus or by certiorari.

In deciding whether or not a state law or procedure offends due process of law, Petitioner respectfully suggests that certain meanings and definitions and principles of due process can be drawn from the decisions of this Court and can be formulated into workable rules for application in habeas corpus and certiorari cases.

Due process, for some ninety years after the ratification of the Fourteenth Amendment to the Constitution, meant, as applied to the state criminal proceedings, "conformity with natural and inherent principles of justice." *Holden v. Hardy,* 196 U.S. 366, 390 (1897). State procedures were constitutionally acceptable unless they offended "some principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U. S. 93, 105 (1933). Due process protected against state laws and practices that disregarded

"fundamental fairness" and were offensive to the "basic standards of justice." *Lyon v. Oklahoma,* 322 U.S. 596, 605 (1943). During this early period of due process, the federal courts, in the foregoing cases and in countless others, held that the rights and protections guaranteed to an accused in the first ten amendments to the Constitution, were not made applicable against the states by virtue of the due process clause of the Fourteenth Amendment. See *Bartkus v. Illinois,* 359 U.S. 121, 124, decided in 1959, only some seven years ago.

In the early age of due process this Court defined as fundamental in state proceedings, these rights: (1) the right to a trial that is not donimated by the "mob," *Moore v. Dempsey,* 261 U.S. 86, 90 (1923); (2) the right of an indigent defendant to have appointed counsel in a capital case, *Powell v. Alabama,* 287 U.S. 45, 67 (1932); and (3) the right *not* to have a coerced confession used as evidence of guilt, *Brown v. Mississippi,* 297 U.S. 278, 285, 286 (1936).

While there were earlier indications, the most logical beginning point for "new" due process would be with this Court's decision in *Mapp v. Ohio,* 367 U.S. 643, handed down in 1961. By "new due process" is meant the start of the incorporation of the first ten amendments to the Constitution into the Fourteenth Amendment, and in *Mapp,* the Court held that the Fourth Amendment protection against unreasonable searches and seizures is "enforceable against the states through the due process clause of the Fourteenth."

Then came a procession of cases defining new rights of a defendant in a state prosecution in terms of the applicability of the first ten amendments to the Con-

stitution. In 1962, *Robinson v. United States,* 370 U.S. 660, the Eighth Amendment protection against cruel and unusual punishment was held to be effective against the states. In 1963, *Gideon v. Wainwright,* 372 U.S. 335, held that the Sixth Amendment guarantee of the assistance of counsel in a criminal case "is made obligatory upon the states by the Fourteenth Amendment." The Sixth Amendment fair trial guarantee has been held to be effective against the states in many cases including *Turner v. Louisiana,* 379 U.S. 466 (1965) and *Estes v. Texas,* 381 U.S. 532 (1965). The right of confrontation by witnesses was held to be applicable to the states in *Pointer v. Texas,* 380 U.S. 400 (1965). The Fifth Amendment prohibition against self-incrimination was made obligatory on the states in *Griffin v. California,* 386 U.S. 609 (1965).

The above are a few of many cases illustrative of new due process under which this Court has incorporated the rights and protections of the first ten amendments into the Fourteenth Amendment and made them applicable to state criminal proceedings.

Accordingly, due process of law today means: (1) that the privileges and protections of the first ten amendments must be observed in state criminal proceedings (this is only generally applicable since in a few areas the Supreme Court has not yet enforced Bill of Rights protections against the states), or (2) that state procedures must be consistent with fundamental fairness and in accord with the basic standards of justice.

There is one additional facet or corallary to due process that must be noted. States are not only prohibited from actions amounting to a denial of "due

process," but they are further enjoined against denying to any person within their jurisdiction "the equal protections of the laws."

At first glance, "equal protection" appears almost synonymous with "procedural due process"; both come to mind whenever a state has a criminal procedure not constitutionally required and a question arises as to whether or not the state has properly interpreted and applied the procedure in a particular case. But, this Court has held that the equal protection clause is not violated even where state officers depart from state law absent a showing of intentional or purposeful discrimination. *Snowden v. Hughes,* 321 U.S. 1 (1944). See also *Norvell v. Illinois,* 373 U.S. 420 (1963). Accordingly, for a federal court to consider an allegation that a defendant has been denied the equal protection of a state's laws, there must be a showing of intentional discrimination in the application of a particular law. Such a showing is apparent in cases like *Griffin v. Illinois,* 351 U.S. 12 (1955), *Douglas v. California,* 372 U.S. 353 (1963), and *Draper v. Washington,* 372 U.S. 487 (1963), where a particular class of persons is denied a right given by state law that is not constitutionally required.

However, if "procedural due process" is regarded as a constitutional right, there need be no showing of intentional discrimination to involve a federal court with the question of the alleged errors of state law or the question of whether a state court was correct in its consideration and resolution of the meaning and application of the statute involved. It is realized that upon an adequate showing of discrimination, the federal judiciary will still have to consider the proper interpretation to be placed on state procedures and statutes in equal

protection situations, but most cases would be screened out as not reviewable by the absence of any deliberate or intentional discrimination by state officials in the application of state law and absent a manifest showing that a state statute discriminates between classes of its citizens.

To summarize, Petitioner's contentions, it is submitted that in order to justify a reversal of a state criminal case the federal courts must find: (1) a denial of due process because the state action is violative of fundamental fairness and the basic standards of justice, or (2) a denial of due process because of an infringement of a right found in the first ten amendments to the United States Constitution which is made applicable to the states by virtue of the due process clause of the Fourteenth Amendment, or (3) a denial of equal protection of law after a showing that a state statute is discriminatory or a showing of intentional discrimination in the application of a law by state law enforcement officers or trial or judicial officials.

It is submitted that interpreting the above cited cases so as to formulate the foregoing rules, which avoid reference to "procedural due process," is not just a matter of semantical sophistry. While this Court can affirm the decision of the Court below by using the standards expressed above, these definitions do provide some guidelines for those engaged in criminal investigation and criminal law. Moreover, these rules will permit federal courts to refuse consideration of every minor error of procedure allegedly committed in state criminal trials. Should federal courts become reviewers of mere procedural errors, instead of violations of fundamental constitutional rights, the state appellate

courts will no longer be a vital and necessary part of our judicial system.

As inferred above, the Court below could have reached the same result by applying the judicial guidelines suggested by Petitioner above. The Court could have determined that it is a violation of due process to execute an insane defendant and that the failure to accord Respondent a post-conviction sanity hearing under the circumstances surrounding this case was a denial of due process because the refusal was offensive to fundamental fairness and the basic standards of justice. Or the Court could have determined that the Texas statutory procedures for the granting of post-conviction sanity hearings (as interpreted by the Texas courts) is inadequate to protect the constitutional right not to be executed while insane. Petitioner, however, does not admit the correctness of the result below and maintains that the Texas procedure whereby the district judge must be satisfied by a sufficient showing that there is a reasonable doubt as to a defendant's sanity adequately protects any constitutional right that a defendant may have not to be executed while insane. (It should here be noted that this Court has never held that the execution of an insane man is a denial of due process.)

However, regardless of the correctness of the result below, the basis and foundation of the Court's opinion will be authority for the review of all alleged state errors, even though the rights impinged on by the alleged errors are not guaranteed by the United States Constitution. It is this underlying basis of the opinion that greatly extends the scope of review by the federal judiciary over state criminal proceedings and the desirability of these far-reaching consequences should be

reviewed by this Court whether or not this Court feels that the decision below is correct in its end result.

Petitioner submits that this Court should consider the "procedural due process" foundation of the opinion below and reject "procedural due process" as a doctrine to be applied in reviewing state criminal cases in either habeas corpus proceedings or certiorari proceedings directed against the highest court of the states.

5. *The decision below will not only affect state criminal proceedings but will have a profound effect on civil cases tried in the state courts by greatly enlarging the grounds for seeking certiorari from this Court in civil cases that are finally determined by the highest state courts.*

The due process clause of the Fourteenth Amendment to the United States Constitution recites that "no state shall deprive any person of life, liberty, or *property* without due process of law."

Given the holding below, this Court can properly be asked to review in certiorari proceedings any decision of the highest state courts and consider any and all alleged errors of state law that are said to be present in a state civil case. This Court will also be requested to interpret state civil laws in contradition to the interpretation placed on these laws by the state courts.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. The only way in which the federal courts can logically avoid sitting as super-appellate courts and reviewing any and all alleged

errors in all the criminal trials of the fifty states is for this Court to reject the doctrine of "procedural due process" as enunciated by the Court below.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,185

EUGENE WELCH,

Appellant,

v.

DR. GEORGE J. BETO,
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 3, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

MORGAN, District Judge: This case has a lengthy history. In order to unravel the issues presented, the case history in both the state and the federal courts must be related in detail.

Appellant Eugene Welch was tried in the District Court of Grayson County, Texas, convicted and sentenced to death for the brutal killing of Robert Wayne Ballou. Welch, a Negro adult, committed the murder of Ballou, a white minor, at Ballou's family home on June 10, 1962, while robbing the Ballou family. Welch was indicted for murder on June 18, 1962. On August

11, 1962, two attorneys from Grayson County, Texas, Robert L. Doss and Charles E. Hughes, were appointed by the State Court to represent Welch. On December 31, 1962, the indictment of June 18, 1962, was dismissed, but on the same day Welch was reindicted for the same crime and Attorneys Doss and Hughes were again appointed to represent Welch. A motion for continuance was made on January 8, 1963, but was denied, and the case was set for trial on January 14, 1963. The motion for continuance was renewed on January 14, 1963, but was denied.

At the trial, which began on January 14, 1963, appellant's sole defense was insanity. This defense was supported by the testimony of Dr. David T. Wells, the only psychiatrist in Grayson County, Texas, who testified without fee. This psychiatrist's testimony was that the appellant had the mental capacity of a twelve-year old, and that he did not know the nature of his acts or the difference between right and wrong at the time of the commission of the crime or at the time of the trial. The state offered evidence from laymen that the appellant was sane, and also from Dr. John Hardy, Grayson County physician, who testified appellant was, in his opinion, sane. On January 24, 1963, the jury resolved the issue of insanity against the appellant, found him guilty, and fixed his sentence at death. On November 13, 1963, the conviction was affirmed,[1] and a motion for rehearing was denied on January 8, 1964. Thereafter, on January 21, 1964, counsel for Welch filed an application with the trial court under Texas Criminal Procedure, Article 932b, Section 3,[2] for a hearing as to

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[1] *Welch v. State*, 373 S.W. 2d 497 (Tex. Cr. 1963).

[2] *Texas Code of Criminal Procedure*, article 932b: * * * Sec. 3. *Insanity as Bar to Proceedings.* If the question of the san-

post-conviction insanity. The application under this provision was supported by an affidavit of the psychiatrist, Dr. Wells, in which affidavit Dr. Wells deposed that he had examined appellant Welch on January 21, 1964, and stated:

> "In my opinion Eugene Welch is mentally ill at the present time, cannot understand the nature and consequences of the act he committed, cannot fully understand the nature of the proceedings which have been had and which are continuing against him, and cannot differentiate right from wrong in the legal sense at the present time. I believe him to be insane at the present time."

At the hearing the state presented no evidence, either orally or by affidavit, to refute Dr. Wells' affidavit, but contended that the affidavit filed on the late of the hearing, January 21, 1964, was identical with the testimony offered by the same psychiatric witness when the case was tried the previous year. The record reveals that the defendant was present at the hearing under Section 3, 932b of Vernon's Annotated Texas Code.

On February 29, 1964, counsel for petitioner filed with the trial judge a motion requesting a post-sentence

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ity of the defendant is raised after his conviction and prior to the pronouncement of sentence in a felony case or while an appeal from that conviction is pending, and sufficient proof is shown to satisfy the judge of the convicting court that a reasonable doubt exists as to the sanity of the defendant, the judge shall empanel a jury to determine whether the defendant is sane or insane. If the jury finds the defendant is insane, the court shall enter an order committing the defendant to a State mental hospital and placing him in the custody of the sheriff for transportation to a State mental hospital to be confined therein as a person charged with a criminal offense until he becomes sane. If the jury finds the defendant is sane, the proceedings against him shall continue.

hearing under Article 932b, Section 4,[3] Texas Code of Criminal Procedure, which incorporated the same affidavit of Dr. Wells which had been filed with the motion under Section 3. The Texas trial court considered this affidavit and denied this petition while Welch was incarcerated at the State Prison at Huntsville, Texas. No evidence was presented on behalf of the state, either orally or by affidavit, to refute Dr. Wells' affidavit of January 21, 1964.

On February 29, 1964, application for a writ of habeas corpus was filed with the state trial court in which Welch asserted that his constitutional rights had been violated because of the denial of his motions under Sections 3 and 4 of Article 932b, and because mob hysteria at the time of the trial prevented him from receiving equal treatment and due process of law. This application for a writ of habeas corpus was denied by the trial judge, and the same writ was denied on March 4, 1964, by the Texas Court of Criminal Appeals.

Thereafter, petitioner Welch filed a writ of habeas corpus in the federal district court for the Southern District of Texas; a full and complete evidentiary hearing was held in March, 1964, and petitioner's applica-

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[3] *Texas Code of Criminal Procedure,* article 932b: * * * Sec. 4. *Insanity as Bar to Execution of Death Sentence.* If the question of the sanity of a person under death sentence is raised and sufficient proof is shown to satisfy the judge of the convicting court or the judge of the district court of the county in which the person is confined that reasonable doubt exists as to his sanity, the judge shall empanel a jury to determine whether the person is sane or insane. If the jury finds the person is insane, the court shall enter an order committing him to a State mental hospital to be confined therein as a person charged with a criminal offense until he becomes sane. If the jury finds the person is sane, the court shall remand him to the proper authority for disposition according to law.

tion for a writ of habeas corpus was denied. This appeal is from the denial of the writ of habeas corpus by the federal district court.

The first question presented by the appellant is whether there was denial of due process, within the meaning of the Fourteenth Amendment to the Constitution of the United States, for the state court to refuse a sanity hearing to one subject to the death penalty when the application for such hearing was supported by the expert evidence of the psychiatrist Dr. Wells deposing that the prisoner was insane.

The first thrust of the argument under this "due process" question is that due process bars the execution of an insane person. Although this is an open question which the Supreme Court of the United States has not decided in terms, individual justices have expressed themselves to this effect,[4] but this Court does not deem it necessary to pass upon the question of whether or not it is a denial of due process to execute an insane person since the law of Texas, Article 932b, *supra,* prohibits the execution of an insane person.

The second thrust under this "due process" question is whether the appellant was accorded due process under the Texas statutes. As stated above, the Texas law creates in petitioner a substantive right not to be executed while insane, even if such right is not contained in the due process clause of the Fourteenth Amendment. Appellant "is entitled to have procedural due process observed in the protection of these substantive

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[4]See: Dissenting Opinion of Justice Frankfurter in *Solebess v. Balkcom,* 339 U.S. 9, and *Caritativo v. California,* 357 U.S. 549; See also Justice Harlan concurring in *Caritativo v. California,* supra.

rights even through substantive due process would not compel the rights to be given." *United States ex rel Smith v. Baldi,* 192 F. 2d 540, 544 (3 Cir. 1951), aff'd. 344 U.S. 561 (1953). Texas law looks to a jury to try this question of sanity where there is reasonable doubt as to such sanity. It is left to the judge of the convicting court to determine whether such reasonable doubt exists, and, although the trial judge is vested with considerable discretion in the matter, he is not given arbitrary power. If he acts in a fashion unsupported by the evidence, he has ceased to act judicially, and has denied the prisoner before him procedural due process.

Here, at the purported hearing, the applicant Welch presented evidence from a psychiatrist that the prisoner was insane at the time of the hearing. This evidence is uncontroverted. While the state seeks to make much of the fact that this psychiatrist's conclusions had been disregarded by a jury on the trial held twelve months before, and that the trial judge had also heard the evidence at the criminal trial in January, 1963, this is hardly helpful in forming a judgment as to whether there is reasonable doubt as to the sanity of Welch at a later time—actually a full year later, on January 21, 1964. Neither would the presence of Welch at the short Section 3 hearing enable the state trial judge to overcome the unrefuted affidavit of Dr. Wells.[5] Welch was not required to prove actual insanity. His burden was to present facts sufficient to create in the Court's mind reasonable ground to doubt his sanity. This burden was

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[5]Dr. Wells is an M.D. specializing in psychiatry. He is a diplomate of the American Board of Psychiatry and Neurology and holds a B.S. and M.D. degrees from Baylor University. He was employed in his profession by the State Board of Hospitals and Special Schools for the State of Texas for five years.

met handily by the affidavit of Dr. Wells on January 21, 1964, in which he deposed he believed Welch to be insane on that date and should be sent to a State hospital. On the strength of the prima-facie showing one of two things was required: (1) the State was required to produce receivable evidence to the contrary sufficient in quality to lead the trial Judge to conclude that there was not "* * * sufficient proof * * * shown to satisfy the Judge * * * that a reasonable doubt exists as to the sanity of the defendant" (see notes, 2, 3, *supra*); (2) failing the production of such controverting evidence and a negative finding thereon, the state trial court was required to empanel a jury to determine Welch's sanity. The failure here to do either constituted a denial of due process. The finding of the state court having no evidence to support such finding is void as to denial of due process. *Thompson v. City of Louisville, et al.*, 362 U.S. 199.

The second question presented is whether the totality of circumstances surrounding the trial of this prisoner, a Negro, who had brutally killed a young white person, combine to make the trial so unfair as to amount to a denial of due process within the meaning of the Fourteenth Amendment.

The District Court listed eight particulars* advanced

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*(1) The presence of many spectators in the courtroom and adjacent public areas;
(2) The past history of violence in the area, namely the lynching in 1929 or 1930 of a negro who allegedly raped a white woman;
(3) The presence of an unnecessarily large number of armed law enforcement officers in the courtroom and courthouse;
(4) The continual printing of and reference to portions of petitioner's confession, which had been witnessed by two reporters, in both newspapers serving the area,

by the prisoner which made up these circumstances which prevented a fair trial and the denial of his due process. The prisoner, however, had the burden of proving that he received an unfair trial, and of proving it * * * "not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann,* 317 U.S. 269, 281. This Court is in accord with the ruling of the District Court that the contentions of the petitioner as to mob hysteria dominating the trial are wholly without factual support and that the reasoning in the opinion on this question should be dispositive of the issue here.[7]

From a careful review of the record on the fact of post-conviction hearings held by the state trial judge, it is clear that the trial judge deviated from the correct standard of law in denying Welch a sanity hearing before a state jury. Having invoked the Texas statutes granting post-conviction hearings, Welch had the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This right was not accorded him. The District Court might conceivably hold a hearing *de novo* on the issue of sanity. But such a hearing would neither adequately protect the federal rights of this state criminal defendant nor take account of the leeway which

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along with continual reference to the racial facts of the case;

(5) The destruction of a letter vital to the defense from a tactical standpoint;

(6) The denial to the defense of access to the confession before the trial;

(7) The unseemly haste in bringing the case to trial; and

(8) The atmosphere of the trial, which was such that the trial officials and jury were in fear for their lives if a verdict other than death were returned.

[7]234 F. Supp. 492.

must be left to the states in the administration of their own criminal justice. Welch should have the opportunity to have the issue of his sanity determined under the laws of Texas under the appropriate state procedures. Where he has not had that opporuntity, he should not be required to establish his insanity in a federal district court. See *Rogers v. Richmond,* 365 U.S. 534.

The judgment of the District Court is reversed, and the case is remanded to the District Court to be held by such District Court in order to give the state opportunity to accord Welch a post-conviction hearing under Section 4, Article 932b, Texas Code of Criminal Procedure, in the light of this opinion, within a reasonable time. In default thereof, the petitioner shall not be executed.

REVERSED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX "B"

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
MAR. 8, 1966

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

March 3, 1966

Mr. Robert Doss
Attorney at Law
P. O. Box 435
Denison, Texas

Mr. Charles Alan Wright
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Austin, Texas

Mr. Charles E. Hughes
Attorney at Law
104 S. Crockett Street
Sherman, Texas

Mr. Lonny F. Zwiener
Assistant Attorney General
State of Texas
Austin, Texas

Re: No. 22815—Eugene Welch
-vs- Dr. George J. Beto, Director,
Texas Department of Corrections

Gentlemen:

The Court has directed that the attorneys for the appellant file typewritten answers to the appellee's petition for rehearing en banc within fifteen (15) days, with the right of the attorneys for the appellee to answer such written briefs within ten (10) days.

Very truly yours,
EDWARD W. WADSWORTH, CLERK

By _____
G. F. Ganucheau,
Chief Deputy Clerk

/bwc

APPENDIX "C"

U.S. COURT OF APPEALS
FILED
MAR. 28, 1966
EDWARD W. WADSWORTH
CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22,185

EUGENE WELCH,

Appellant,

v.

DR. GEORGE J. BETO,
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(March 28, 1965)

On Petition for Rehearing

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

APPENDIX "D"

U.S. COURT OF APPEALS
FILED
APR. 26, 1966
EDWARD W. WADSWORTH
CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22,185

EUGENE WELCH,

Appellant,

v.

DR. GEORGE J. BETO,
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(, 1966)

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

The Motion of the Appellee to reconsider the decision on Appellee's petition for rehearing is GRANTED; and the Clerk is directed to file the brief styled "Reply to Appellant's Brief in Opposition to Petition for Rehearing" which under the previous order of the Court was timely tendered for filing on March 29, 1966; but upon reconsideration, including all briefs and arguments, the petition of Appellee for hearing is DENIED.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari were served on the attorneys for the Respondent by depositing same in the United States Mail, postage prepaid, certified mail, on this the — day of July, 1966, addressed as follows: Mr. Robert L. Doss, Citizens National Bank Building, Denison, Texas 75020, Mr. Charles E. Hughes, 104 S. Crockett Street, Sherman, Texas 75090, Mr. Charles Alan Wright, 2500 Red River Street, Austin, Texas 78705.

LONNY F. ZWIENER
Assistant Attorney General

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EXHIBIT E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22,185

D. C. Docket No. 64-H-103—Civil Action

EUGENE WELCH,

Appellant,

v.

DR. GEORGE J. BETO,
DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Dr. George J. Beto, Director, Texas Department of Corrections, be condemned to pay the costs of this cause in this Court for which execution may be issued out of said District Court.

February 3, 1966

Issued as Mandate:
Apr. 6, 1966

Court Costs payable to Clerk,
U. S. Court of Appeals:

Docketing cause, etc.__$25.00

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PAGE

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Office-Supreme Court, U.S.
FILED
AUG 18 1966
JOHN F. DAVIS, CLERK

No. 377

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

DR. GEORGE BETO,
Director of Texas Department of Corrections,
Petitioner,

v.

EUGENE WELCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PAGE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 377

DR. GEORGE BETO,
Director of Texas Department of Corrections,
Petitioner,

v.

EUGENE WELCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

Was it a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, for the state court to refuse a sanity hearing to one subject to the death penalty where the state provides by statute for such a hearing, the application for the hearing was supported by expert evidence that the prisoner was insane, and no evidence to the contrary was presented to the state court?

Statement of Case

In most respects petitioner's statement of the case is acceptable to respondent. Respondent cannot accept, however, petitioner's repeated assertion that the refusal of the state trial judge to order a sanity hearing "was upheld by the Texas Court of Criminal Appeals." (Pet. 5, 7.) Two separate applications for a sanity hearing are here involved. On January 21, 1964, respondent moved for a sanity hearing under article 932b, § 3, of the Texas Code of Criminal Procedure then in force, which authorized such a hearing after conviction and prior to sentence. The motion was supported by an affidavit of Dr. David T. Wells, a psychiatrist, who had examined respondent on several occasions, including that very day. The motion was denied. On February 4th, 1964, the Court of Criminal Appeals refused to entertain an appeal from this denial on the stated ground of "want of jurisdiction." (Tr. 43-44.) This is consistent with the stated Texas view that appeal will not lie from a preliminary insanity hearing, *Pena v. State,* 167 Tex. Cr. 406, 407-408, 320 S.W. 2d 355, 356-357 (1959), *Bush v. State,* 172 Tex. Cr. 54, 57, 353 S.W. 2d 855, 857 (1962), and with the unpublished statement by the clerk of that court that "the Court takes the position that no appeal lies from a post-conviction insanity hearing." Petition for Certiorari, *Bush v. Texas,* No. 877 Misc., O.T. 1963, p. 10, quoted at Transcript 104. Thus it can hardly be said that the Court of Criminal Appeals "upheld" the denial of the January 21st motion.

After respondent was sentenced to death, he moved again, on February 29th, 1964, for a sanity hearing, this time proceeding under art. 932b, § 4, of the Texas Code of Criminal Procedure then in force, which authorized such a hearing for those under sentence of

death. This motion was denied the day it was filed; habeas corpus was sought from the Court of Criminal Appeals on March 3d and denied on March 4th. (Tr. 48.) The most likely interpretation of the denial is that habeas corpus is not available in Texas to review denial of a sanity hearing. The petitioner has cited no authority to show that denial of the application was a decision on the merits, no such case is known to counsel for respondent, and *Ex parte Elkins,* 168 Tex. Cr. 117, 324 S.W. 2d 1 (1959), strongly suggests, if it does not hold, that such collateral remedies as habeas corpus are not available in Texas for those who claim insanity after conviction.

Argument

The decision below was clearly right. It is not in conflict with, but is compelled by, decisions of this Court and of other courts of appeals. The court below found it unnecessary to decide whether there is a constitutional right not to be executed while insane. Since Texas commendably gives such a substantive right by statute, the court of appeals held that it is constitutionally required to observe the fundamentals of due process in applying the state statute. As there was far more than a prima facie showing that respondent was insane, and no evidence whatever to the contrary, refusal of a sanity hearing was a denial of due process under the familiar rule of *Thompson v. City of Louisville,* 362 U.S. 199, 206 (1960).

The present case was decided before this Court decided *Pate v. Robinson,* 383 U.S. ____ (1966), but the result here follows a fortiori from *Robinson.* There was no question in *Robinson* as to the constitutional adequacy of the procedures provided by the Illinois statutes but only as to their application. As the Sev-

enth Circuit said in the *Robinson* case, "this procedure satisfies the requirement of due process; to deny the established procedure to a particular accused, however, is a denial of due process." 345 F. 2d 691, 695 (7th Cir. 1965). Illinois law required a sanity hearing whenever a bona fide doubt was raised as to a defendant's sanity at the time of the trial. The Illinois Supreme Court, interpreting this state test which is similar to the test of the Texas statutes involved in the present case, had thought no facts were brought to the trial court's attention sufficient to raise a bona fide doubt as to Robinson's sanity. This Court held, however, that the evidence introduced on Robinson's behalf entitled him to a hearing on the issue of his sanity, even though he had not requested such a hearing, and that failure of the trial court to hold a sanity hearing was such a denial of Robinson's constitutional rights as to entitle him to a writ of habeas corpus. In the present case the uncontradicted showing of insanity was far stronger than in Robinson's case.

In *Robinson* this Court cited with approval *Thomas v. Cunningham,* 313 F. 2d 934 (4th Cir. 1963). In *Thomas* the Fourth Circuit praised the "humane legislation" by which Virginia provides for pre-trial mental examination of an accused, but said that "the federal court is obliged to scrutinize the procedures by which" a particular defendant's claim for such an examination was rejected. Since "reliable and uncontroverted sworn medical testimony" supported the prisoner's claim of insanity, the trial court's refusal to order a mental examination "was so arbitrary as to constitute a denial of due process." *Id.* at 939-940. Indeed Thomas was ultimately ordered released. *Thomas v. Cunningham,* 335 F. 2d 67 (4th Cir. 1964). See also *Snider v. Peyton,* 356 F. 2d 626, 628 (4th Cir.

1966), directing the district court on habeas corpus to consider a prisoner's claim that his constitutional rights had been denied by failure of the state court to hold a hearing on whether he should not be executed because he was presently insane.

In *Irvin v. Dowd,* 366 U.S. 717, 721-722 (1961), this Court said that states are not constitutionally required to give a jury trial in criminal cases, but held that if they do, the trial must be fair and the verdict of the jurors must be based upon the evidence developed at the trial. This is precisely the principle of procedural due process which petitioner now attacks.

Petitioner misconceives the holding below when he repeatedly asserts that it would permit review on habeas corpus of "mere procedural errors, instead of violations of fundamental constitutional rights." (Pet. 17.) Most state errors are now unreviewable, and will remain so if the decision below stands. It is only where the state error is of constitutional dimension—as, here, in making a finding supported by no evidence whatever—that federal intervention will be possible.

On the view taken by petitioner, a federal court could give no relief if the state judge had refused a sanity hearing because an armed mob was in control of the courtroom, demanding respondent's execution. Surely the Great Writ and the Fourteenth Amendment are not so puny.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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August 8, 1966